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OFFICE OF THE VICE PRESIDENT –  
LABORATORY MANAGEMENT

OFFICE OF THE PRESIDENT  
1111 Franklin Street, 5<sup>th</sup> Floor  
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October 5, 2001

U.S. Department of Energy  
Office of Worker Advocacy, EH-8  
Attn: Ms. Loretta Young  
(e-mail: [loretta.young@eh.doe.gov](mailto:loretta.young@eh.doe.gov))  
1000 Independence Avenue  
Washington, DC 20585

Dear Ms. Young:

Please find attached, the testimony from the University of California, Office of the President for the Public Meeting to be held in Washington, DC on October 10, 2001 for the Proposed Rule 10 CFR 852, "Guidelines for Physicians Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits".

Dr. Peter Lichty, the Occupational Medicine Manager from Lawrence Berkeley National Laboratory will be the official representative of the University for this Public Meeting. Also attending the meeting to answer any additional questions you may have are; Ellen Castille, Attorney with the Office of the Laboratory Counsel at the Los Alamos National Laboratory, and Bob Perko, Manager of the Staff Relations Division at Lawrence Livermore National Laboratory.

The University of California appreciates the opportunity to participate in this important forum and reserves the right to provide additional written comments as a part of the rulemaking process.

Sincerely,

Howard Hatayama, Director  
Environment, Safety and Health  
Laboratory Management

Copy to:  
James Koonce, UCOP/LAO  
UC/Laboratory EEOICPA POCs  
Mark Barnes, DOE-OAK  
Phil Griego, DOE-AL

5/11/01

**University of California, Office of the President, Testimony on Proposed Rule 10 CFR 852 "Guidelines for Physicians Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits"**

Good morning, my name is Dr. Peter Lichty and I am the Occupational Medicine Manager for the Lawrence Berkeley National Laboratory. I am here today to present comments from the University of California regarding recently proposed regulations governing the physician panels created under the Energy Employees Occupational Illness Compensation Program Act. With me today are Ellen Castille, Attorney with the Office of the Laboratory Counsel with legal oversight responsibility for risk management at the Los Alamos National Laboratory, and Bob Perko, Manager of the Staff Relations Division, which includes risk management and workers compensation for the Lawrence Livermore National Laboratory. As you know, the University of California operates these three Department of Energy National Laboratories. Two of these National Laboratories are located in California and one in New Mexico, although we also have employees in other states and the District of Columbia.

Compensating employees for occupational illnesses is not a new activity. Over the years, employees of the University of California at the national laboratories have been compensated for asbestosis, leukemia, beryllium lung disease, chronic bronchitis and other illnesses. The University of California is required to, and routinely does, accept legal responsibility as defined by the California and New Mexico Labor Codes under the jurisdiction of the Workers Compensation Appeals Board in California and the Workers Compensation Administration in New Mexico.

The California Labor Code established workers compensation benefits in 1913. Over the years, a variety of adjustments have been made to the labor code, covering such subjects as apportionment of cumulative trauma claims (including asbestos exposures), compensation for chemical sensitivity, issues in determining legal causation and occupational illness latency periods. There are no illnesses excluded from the California workers compensation system. The general standard of proof is that an illness must be "more likely than not" (California) or "as a medical probability" (New Mexico) caused or aggravated by occupational exposures.

As a state agency, the University of California is responsible to the taxpayers for the wise use of their money, and the Laboratories are responsible for the use of federal tax dollars. This means that, prior to accepting a claim, the university should verify that occupational illness claims were caused by University of California employment. California state law allows the University to take up to 90 days to verify employment, verify exposure, and seek an expert medical opinion as to causation. Claims that are denied can be appealed to the Workers Compensation Appeals Board. An Administrative Law Judge decides, based on medical evidence, questions about illness causation.

The financial costs of workers compensation claims are funded by a "payroll burden". This cost is paid not only by DOE, but also by all national laboratory-funding sources, both public and private. Currently, for example, the Lawrence Berkeley National Laboratory sets aside for workers compensation costs 91 cents for every one hundred dollars of payroll. This payroll burden rate is established after reviewing the average claims experience for a three-year period, after the claims have aged two years. For example, in March of 2001, the payroll rate was established after reviewing claims beginning July 1st 1996 and ending June 30th 1999. This demonstrates that the effects of increasing workers compensation costs is not factored in for two years after the claim is filed. In addition, the cost for that claim will be included in all future actuarial analyses for the life of the claim.

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The recent experience of the University of California has been that medical expenses are increasing at a faster-than-expected rate. The most recent payroll burden adjustment was a 17 percent increase, primarily due to this factor. One open cancer claim is currently expected to cost over \$162,000.

The University of California feels that it is inappropriate for the Department of Energy to change our current practice of evaluating workers compensation claims according to laws established by state legislation and rules developed by state workers' compensation administrations. These proposed regulations do not recognize the university's right to evaluate new claims. In fact, they allow for the Secretary of Energy to direct the University of California to accept claims. The proposed regulatory language asks the university to accept claims "to the extent permitted by law". In fact, workers compensation law does not *limit* the university's *accepting* claims; rather it *permits* the university to evaluate claims. Removing the University's right to evaluate these claims would severely compromise the University's ability to effectively manage its workers compensation program.

With regard to the specifics of these regulations, the University would like to make the following points:

- Section D of the Energy Employees Occupational Illness Compensation Program act is permissive, not required. The Secretary of Energy has the option to decide not to negotiate the required memoranda of understanding with the fifty states. We have been told in informational sessions coordinated by DOE/HQ that DOE intends to enter into Memoranda of Understanding with the states that would not change state law or regulation. If that is truly the case, then an MOU is not needed and it will not change the rights of the employee. In the cases of California and New Mexico, we see no benefit to trying to influence case outcomes under the current State systems. The absence of an MOU would be a continuation of the benefits and rights currently enjoyed by employees and employers in California and New Mexico. The three laboratories have historically had very few toxic substance workers compensation claims go to hearing or trial. In great part that is attributable to satisfied workers. The Laboratories do accept toxic substance claims that appear to be valid under state law. Because the workers get reasonable and necessary medical treatment for their occupational illnesses, they do not find it necessary to litigate.
- Much of the proposed regulation discusses how the DOE Program Office will screen occupational illness claims. We do not see how the DOE can accomplish that task. Under the state systems, claims are not screened before presentation to the Workers Compensation Administration. Claimants are actually evaluated by medical personnel. Each party has subpoena authority to obtain the appropriate past medical records; employment records and each can obtain expert opinions. A legal expert familiar with state law, the workers compensation mediator or judge, evaluates the evidence, including taking live medical testimony if necessary. Evaluating a complicated workers' compensation claim is complex. We do not believe DOE, or any Federal agency, that is essentially unfamiliar with specific state law and regulation and that is conducting only a paper review can assemble the evidence required to make a decision about whether any individual claim is valid according to applicable state law and regulation.
- The proposed regulations call for the documentation of State criteria for the compensation of occupational illnesses. These criteria, in our opinion, cannot be easily summarized. They are developed over many years of Labor Code amendments. In addition, toxic exposure claims often relate to unique circumstances and exposures, where a specific criterion, such as latency for a particular cancer, has never been legally established. In the proposed rulemaking, DOE asks what standard of proof should apply to

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claims. State law in each jurisdiction mandates the standard of proof. If DOE is serious about not mandating a change in state law, then the level of standard of proof is not a question open to consideration.

- If we had to choose between one of the three alternatives outlined in these regulations, we prefer that state officials make any screening decision for DOE according to the complex rules present in each state.

- In many states, one area where case law is well established is the sharing of liability for the cumulative exposure to asbestos across multiple employers. This apportionment requires extensive investigation into past employment records and evaluation of past exposures. DOE will not have the authority under these regulations or the resources to collect these records.

The University of California, including the University's National Laboratories, has always accepted workers compensation claims we believe to be valid under applicable state law. We currently have open claims on asbestosis, chronic bronchitis, beryllium lung disease and leukemia among others. The State systems under which we operate give due process in the consideration of these claims. Our primary request today is that the due process currently in place be continued, and not be biased by Federal pressure. Additionally, this matter should be of great concern to taxpayers who, depending on the system, pay for workers compensation claims through their federal or state taxes or through both their federal and state taxes. Workers who incurred illnesses as a result of their work for the government should be and are entitled to reasonable and necessary medical treatment and, if appropriate, indemnification benefits. Taxpayers, however, should not be overburdened by paying for claims that are not valid under state law.